IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF PITKIN*

STATE OF COLORADO

Criminal Action No. C-1616

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, vs. THEODORE ROBERT BUNDY, Defendant.	MEMORANDUM OPINION AND ORDER (Re: Motion to Strike the Death Penalty From Consideration)

On May 16, 1977, the defendant filed a Motion to Strike the Death Penalty from Consideration in this case on numerous grounds, including violation of the prohibition of cruel and unusual punishment pursuant to the Eighth and Fourteenth Amendments to the Constitution of the United States of America. The motion was argued on June 7, 1977 and again on June 23, 1977. The People were represented by Deputy District Attorney Milton Blakey, Esq. of the Fourth Judicial District, who had been appointed as a deputy district attorney in the Ninth Judicial District for the purpose of this case. Defendant represented himself and was assisted by James F. Dumas, Jr., Chief Deputy Public Defender, who at the time was acting as advisory counsel for the defendant.

The Court has considered the motion and argument of counsel and the briefs filed by counsel and, on the basis thereof, issues the following opinion and order.

The defendant is charged with the crime of first degree murder under the laws of the State of Colorado, pursuant to a statute which provides:

> "18-3-102. Murder in the first degree. (1) A person commits the crime of murder in the first degree if: (a) After deliberation and with the

*Transferred to El Paso County prior to entry of Order.

intent to cause the death of a person other than himself, he causes the death of that person or of another person; ..." C.R.S. 18-3-102 (1973), as amended.

Murder in the first degree is a class one felony. Id.

Upon conviction of a class one felony, a separate sentencing hearing is to be conducted before the trial jury to determine whether the defendant should be sentenced to death or life imprisonment. C.R.S. 16-11-103 (1973), as amended. That statute is lengthy and is set forth in full in the appendix to this opinion.

Defendant contends that to impose the death penalty upon conviction of the crime with which he is charged would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

Decisions of the United States Supreme Court in recent years provide guidelines to determine whether a punishment is cruel and unusual in the Eighth Amendment sense. If the procedures for imposing sentence create a substantial risk that the sentence will be imposed arbitrarily or capriciously, the punishment may be cruel and unusual. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972); Gregg v. Georgia, _____U.S._____, 96 S. Ct. 2909 (1976) If the punishment is excessive, it is cruel and unusual punishment. See Gregg v. Georgia, supra.

Punishment may be excessive either because it involves unnecessary or wanton infliction of pain or because it is grossly out of proportion to the severity of the crime. See Gregg v. Georgi supra. In Coker v. Georgia, _____U.S._____, 97 S.Ct. 2861 (1977), a death sentence was held to be grossly out of proportion to the sever of the crime of rape of an adult woman.

The Eighth Amendment prohibition of cruel and unusual puni

ment is not a static concept. "(t)he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, at p. 101 of 356 U.S., cited in Gregg v. Georgia, supra. "But our cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty must also accord with 'the dignity of man' which is the 'basic concept underlying the Eighth Amendment.' Trop v. Dulles, supra..." Gregg v. Georgia, at p. 2925 of 96 S.Ct.

The death penalty does not constitute cruel and unusual punishment under all circumstances. Gregg v. Georgia, supra; Proffitt v. Florida, _____U.S._____, 96 S.Ct. 2960 (1976); Jurek v. Texas, _____U.S._____, 96 S.Ct. 2950 (1976). Murder is an offense for which, under appropriate circumstances, the death penalty may be imposed. Gregg v. Georgia, supra; Proffitt v. Florida, supra; Jurek v. Texas, supra.

In the process of deciding whether the death penalty is to be imposed, consideration of the character and record of the individual offender and the circumstances of the offense are constitutionally required. Woodson v. North Carolina, _____U.S._____, 96 S.Ct. 2978 (1976). In that case, it is stated by the plurality at p. 2991 of 96 S.Ct:

> "While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlyi the Eighth Amendment, see Tropp v. Dulles, 356 U.S., at 100 78 S.Ct., at 597 (plurality opinion), requires consideratio of the character and record of the individual offender and the circumstances of the particular offense as a constituti ally indispensable part of the process of inflicting the penalty of death."

Thus, a statute making the death penalty mandatory for first degree murder, which included any deliberate and premeditated homicide and any felony murder, without regard to the character and record of the individual offender or the circumstances of the offense is

unconstitutional. Woodson v. North Carolina, supra. Even if a mandatory death penalty statute limits the crimes for which death is to be imposed to narrowly drawn categories of first degree murder, the same constitutional infirmity exists if the sentencing procedures do not permit consideration of the character and record of the offender and the circumstances of the offense. Stanislaus Roberts v. Louisiana, _____U.S._____, 96 S.Ct. 3001 (1976). And even where a mandatory death penalty statute relates to the narrow category of killing a human being when the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or peace officer who was engaged in the performance of his lawful duties, the imposition of the penalty is unconstitutional. Harry Roberts v. Louisiana, _____U.S._____ 97 S.Ct. 1993 (1977); Washington v. Louisiana, 428 U.S. 906, 96 S.Ct. 3214 (1976). In Harry Roberts, the Court said, at p. 1995 of 97 S.Ct.

> "To be sure, the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravated circumstance. There is a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property. But it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer. Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer and which are considered relevant in other jurisdictions."

> "As we emphasized repeatedly in Roberts* and its companion cases decided last term, it is essential that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense. Because the Louisiana statute does not allow consideration of particularized mitigating factors, it is unconstitutional."

See Jurek v. Texas, supra, at p. 2958 of 96 S.Ct., where it is said:

> "What is essential is that the jury have before it all possible relevant information about the individual

*Stanislaus Roberts v. Louisiana, supra.

> defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced."

The Court in Harry Roberts v. Louisiana, supra, left open the question whether a mandatory death penalty might pass constitutional muster where based upon intentional killing by a person serving a life sentence. It suggested that such a situation presents "a unique problem that may justify such a law" Harry Roberts v. Louisiana, supra, at p. 1995, footnote 2, and at p. 1996, footnote 5, of 97 S. Ct.

Although striking down the mandatory death penalty statutes the Court has upheld the constitutionality of certain death penalty statutes which permitted consideration of mitigating circumstances. Gregg v. Georgia, supra; Proffitt v. Florida, supra; Jurek v. Texas supra.

The purposes for which evidence of mitigating circumstances may be received under the Georgia, Florida and Texas statutes and the procedures under those statutes for determination of the appropriate penalty are instructive in determining the scope of evidence of mitigating circumstances and the purpose of such evidence which are mandated by the United States Constitution. The statutes of these three states will be considered individually, and the Colorado statute will then be compared to them.

Florida:

The Florida statute provides for a bifurcated trial, with the sentencing stage to take place before the same jury which determined guilt.

The Florida statute contains eight aggravating circumstances and the following seven mitigating circumstances:

> "(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime." Sec. 921.141(6) (Supp. 1976-1977), Florida statutes, cited in Footnote 6 of Proffitt v. Florida, supra, at p. 2965 of 96 S.Ct.

At the sentencing stage, "Evidence may be presented on any matter the judge deems relevant to sentencing and must include matters relating to certain legislatively specified aggravating and mitigating circumstances." (Emphasis added). (Conclusion as stated by the United States Supreme Court in Proffitt v. Florida, supra, at p. 2964 of 96 S.Ct.) The jury is directed to consider "(w)hether sufficient mitigating circumstances exist...which outweigh aggravating circumstances found to exist; and...(b)ased on these considerations, whether the defendant should be sentenced to life (imprisonment) or death." Florida statute, quoted in Proffitt v. Florida, supra, at p. 2965 of 96 S.Ct. The jury determination is by majority vote and is advisory only. In order to sustain a death sentence following a jury recommendation of life "...the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Florida; 1975), quoted in Proffitt v. Florida, supra, at p. 2965 of 96 S.Ct. The trial court must then weigh the statutory aggravating and mitigating circumstances in imposing sentence. If a death sentence is imposed, the trial court must make written findings of fact that sufficient statutory aggravating circumstances exist and that there are insufficient statutory

at p. 2920 of 96 S.Ct.

Under Georgia case law, the defendant is accorded substantial latitude as to the types of evidence he may introduce, and the jury may consider the evidence adduced at the guilt stage. Gregg v. Georgia, supra. In determining sentence, the jury is to consider "any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of (10) statutory aggravating circumstances which may be supported by the evidence..." Georgia statute, quoted in Gregg v. Georgia, supra, at p. 2921 of 96 S.Ct. The scope of the nonstatutory aggravating or mitigating circumstances is not delineated in the statute. The jury imposes a binding recommendation of sentence, and the death sentence may be imposed only if one of the statutory aggravating circumstances is found to exist beyond a reasonable doubt and the jury then elects to impose the death sentence. Gregg v. Georgia, supra. The jury must specify the aggravating circumstances found if its recommendation is death.

Texas:

Texas limits capital homicides to five specific types of especially serious homicides.

The Texas statute provides for a bifurcated trial, with the sentencing stage to take place before the same jury which determined guilt. At the sentencing stage, any relevant evidence may be produced. The jury is then required to answer the following three questions:

> "(1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased."
>
> Texas statute, quoted in Jurek v. Texas, supra, at p. 2955 of 96 S.Ct.

the people or the defendant..." C.R.S. 16-11-103(2) (1973). The jury must render a verdict as to the existence or nonexistence of each of the statutory mitigating and aggravating factors. If the verdict is that none of the statutory mitigating factors exists and that one or more of the statutory aggravating factors exists, the court must sentence the defendant to death. Any other combination of findings results in a sentence to life imprisonment. The statutory mitigating factors may be summarized as: (1) under the age of 18, (2) impairment of capacity to appreciate wrongfulness of conduct or to conform conduct to requirements of law, (3) duress, (4) relatively minor participation in offense committed by another and (5) inability reasonably to foresee that his conduct would cause or create a grave risk of death to another. Seven of the eight statutory aggravating factors focus on the nature of the offense; the eighth relates to prior conviction for a crime involving a penalty of life imprisonment or death. C.R.S. 16-11-103 (1973).

Under the Colorado statute, being under the age of 18 is the only aspect of defendant's personal background and circumstances, other than mental condition at the time of the crime, which can be considered. Whether defendant is just 18 or an experienced, mature adult has no relevance. Defendant's criminal record or lack thereof has no relevance. His past contributions to family or community, his remorse or lack thereof and other factors which reflect defendant's character and background have no relevance. In Woodson v. North Carolina, supra, in the course of holding the consideration of the character and record of the individual offender to be a constitutionally indispensable part of the process of inflicting the penalty of death, it was said by the plurality at p. 2991 of 96 S.Ct:

"A process that accords no significance to relevant

> facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."

In summary, Florida, Georgia and Texas all allow the defendant substantial latitude in introduction of evidence of mitigating circumstances at the sentencing stage in a capital case. Direct use of that evidence by the jury is an important part of determination of the sentence by the Georgia jury. Direct use of that evidence is an important part of the process by which the Texas jury answers statutory questions, such answers in turn being determinative of the sentence. In Florida, the jury uses that evidence to arrive at an advisory sentence of death or life imprisonment. The Florida courts cannot impose a death penalty in the face of an advisory sentence of life imprisonment unless it can find the facts suggesting a sentence of death to be so clear and convincing that virtually no reasonable person could differ. The narrow scope of mitigating evidence which is available to juries in Colorado at the sentencing stage in a capital case presents a marked contrast to the Florida, Georgia and Texas patterns. Viewed from the other side of the coin, many mitigating circumstances necessary to develop facets of the character and record of the defendant as a uniquely individual human being have no relevance to the mitigating factors prescribed by law in Colorado. Colorado's statutory sentencing plan is too rigid to satisfy constitutional standards.

Consideration has been given to the possibility of construing the Colorado statute to permit introduction of a broad range of mitigating evidence. The statute is presumed to be constitutional

and must be construed to preserve its constitutionality if at all possible. See People v. Prante, 177 Colo. 243, 493 P.2d 1083 (1972). A statute can be found unconstitutional only if its unconstitutionality is established beyond a reasonable doubt. See People v. Prante, supra. The statute is explicit in authorizing presentation of evidence bearing on the statutory mitigating and aggravating factors. The jury's function is to determine whether any of these mitigating factors or aggravating factors exist. There would be no legitimate use to which the jury could put evidence in mitigation not relevant to the statutory mitigating factors. Any attempt to construe the Colorado statute to permit consideration and use of mitigating evidence not relevant to the statutory mitigating factors would do violence to the statutory pattern and would constitute impermissible judicial amendment of the legislative enactment. It also would invite impermissible jury nullification. See Woodson v. North Carolina, supra, at p. 2990 of 96 S.Ct.; Stanislaus Roberts v. Louisiana, supra, at p. 3007 of 96 S.Ct.

Accordingly, it is concluded that the imposition of the death sentence pursuant to Colorado statute for the offense with which the defendant is charged would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States of America. Whether the

Colorado Constitution imposes a higher standard is unnecessary to consider.

Defendant has urged other bases upon which he contends that the death sentence could not become a permissible sentencing alternative in his case. These will be considered briefly but not in detail in view of the conclusion expressed above.

Vagueness of Statutory Mitigating Factors:

Defendant contends that the statutory mitigating factors, except for age, are too vague to be applied. The same challenge to strikingly similar mitigating circumstances was raised and rejected in Proffitt v. Florida, supra. The Court said at p. 2969 of 96 S.Ct:

> "While these questions and decisions may be hard, they require no more line-drawing than is commonly required of a fact finder in a lawsuit."

See also, Jurek v. Texas, supra, at p. 2957 of 96 S.Ct.

Failure to provide objective standards to guide the jury in imposition of the penalty of death:

Except as defendant imports objections to the availability and scope of appellate review, limitation of evidence in mitigation, allocation of burden of proof and other objections separately stated, his argument of failure to provide objective standards seems to be a variant of the vagueness argument, considered above, with respect to statutory mitigating factors. The only aggravating factor which reasonably could be contended to be vague is the final factor "He committed the offense in an especially heinous, cruel or depraved manner." C.R.S. 16-11-103(6)(i) (1973). Florida has a similar standard, except that "atrocious" is substituted for "depraved". The Florida Supreme Court has construed the standard to be directed only at the conscienceless or pitiless crime which is unnecessarily torturous to the victim. As so construed, the United States Supreme

Court held that "We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." Proffitt v. Florida, supra, at p. 2968 of 96 S.Ct. See Gregg v. Georgia, supra, at p. 2938 of 96 S.Ct. The Court in Proffitt also found not impermissibly vague the standard that "the defendant knowingly created a great risk of death to many persons,", a standard similar to the penultimate aggravating circumstance in the Colorado statute. C.R.S. 16-11-103(6)(h) (1973).

Failure to provide for appellate review:

As pointed out in the briefs, the availability and scope of appellate review of jury findings at the sentencing stage of a first degree murder trial in Colorado are not at all clear. In Gregg v. Georgia, supra, in which the jury had the sentencing authority, the Court considered Georgia's elaborate appellate procedures for assuring proportionality of sentences to be important to the validity of the procedure for imposing the death penalty. In Florida, where they jury makes a nonbinding sentencing recommendation, the state supreme court took a similar review role on its own initiative without specific statutory authority, and this was considered important to the validity of the Florida system in Proffitt v. Florida, supra. Texas too has appellate review of the jury's decision, which includes a prediction of probabilities that the defendant would commit acts of violence that would constitute a continuing threat to society. Under the Colorado system, the appellate courts are given no legislative authority to review for proportionality. The limited evidence relevant to the mitigating and aggravating factors in many cases would inhibit the appellate court from evaluation and comparison necessary to determine proportionality of sentences. It appears that there is a substantial question whether

the Colorado appellate review procedure is adequate to assure that the death penalty will not be arbitrarily or capriciously imposed. In view of the fact that the statute has been found infirm for another reason, and in view of the absence of guidelines at this time as to how the Colorado appellate courts will view their own roles on appeal, this issue will not be pursued to the extent necessary to make a definite determination.

Failure to show that the death penalty fulfills a compelling state interest which could not be fulfilled by a less drastic means:

Defendant argues that substantive due process requires that the state demonstrate that the death sentence is the least restrictive means to further a compelling government interest.

In Gregg v. Georgia, supra, it was held that the punishment of death does not invariably violate the constitution and that a Court

> "...may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved." 96 S.Ct. at p. 2926

The Court went on to hold the death penalty constitutional as a penalty for murder under the procedure prescribed by Georgia for its imposition. Thus, defendant's argument, to the extent it is founded upon the United States Constitution, is not well taken.

Defendant urges a substantive due process analysis. The analysis proceeds from the characterization of life as a fundamental constitutional right. Infringement of a fundamental constitutional right must be subjected to strict scrutiny under a due process analysis. This requires the state to demonstrate a compelling government interest to support the infringement and to find an absence of less restrictive means to realize that compelling government interest. The analysis then proceeds to attempt to show

that the death penalty is not the least restrictive means available to satisfy the government interest to protect society from murderers and to deter murders. Such an analysis has been used by the Massachusetts Supreme Court in invalidating the imposition of the death penalty for the crime of murder committed in the course of a rape or an attempted rape under the Massachusetts declaration of rights.

The United States Supreme Court plurality has not analyzed the issue in such terms. Gregg v. Georgia, supra. Of course, the Colorado courts are free to adopt such analysis in construing the Colorado Constitution. It is unnecessary to embark on such an analysis in view of the conclusion reached above, and it would be unwise to do so absent the necessity therefor.

Violation of due process concepts of proof beyond a reasonable doubt and presumption of innocence:

The defendant argues from cases requiring the People to prove every element of their case, including negation of affirmative defenses, beyond a reasonable doubt that such a burden is constitutionally required in establishing aggravating circumstances and eliminating mitigating circumstances at the penalty stage. No case is cited directly in support of this proposition. Nothing in the Gregg, Proffitt, Jurek, Woodson, Stanislaus Roberts line of cases suggests such a requirement. The People take the position in their brief that they have the burden to establish aggravating factors and to negate the existence of mitigating factors. Even if this burden can be borne by establishing such matters by a preponderance of the evidence, no constitutional infirmity is perceived in use of such a procedure at the sentencing stage.

Based upon the foregoing Memorandum Opinion, it is found that the Colorado statutory procedures for imposition of the death

penalty violate the prohibition against cruel and unusual punishment under the United States Constitution beyond a reasonable doubt; accordingly,

IT IS ORDERED THAT the motion to strike the death penalty from consideration in this case be granted.

Defendant has moved for a bill of particulars with respect to the aggravating circumstances upon which the People will rely; based upon the foregoing order, it is found that the motion for bill of particulars is moot.

Done this 27 day of December, 1977.

BY THE COURT:

George C. Dorr

District Judge

16-11-103. Imposition of sentence in class 1 felonies. (1) Upon conviction of guilt of a defendant of a class 1 felony, the trial court shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment. The hearing shall be conducted by the trial judge before the trial jury as soon as practicable. If a trial jury was waived or if the defendant pleaded guilty, the hearing shall be conducted before the trial judge.

(2) In the sentencing hearing any information relevant to any of the aggravating or mitigating factors set forth in subsection (5) or (6) of this section may be presented by either the people or the defendant, subject to the rules governing admission of evidence at criminal trials. The people and the defendant shall be permitted to rebut any evidence received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the evidence to establish the existence of any of the factors set forth in subsection (5) or (6) of this section.

(3) After hearing all the evidence, the jury shall deliberate and render a verdict, or if there is no jury the judge shall make a finding, as to the existence or nonexistence of each of the factors set forth in subsections (5) and (6) of this section.

(4) If the sentencing hearing results in a verdict or finding that none of the factors set forth in subsection (5) of this section exist and that one or more of the factors set forth in subsection (6) of this section do exist, the court shall sentence the defendant to death. If the sentencing hearing results in a verdict or finding that none of the aggravating factors set forth in subsection (6) of this section exist or that one or more of the mitigating factors set forth in subsection (5) of this section do exist, the court shall sentence the defendant to life imprisonment. If the sentencing hearing is before a jury and the verdict is not unanimous, the jury shall be discharged, and the court shall sentence the defendant to life imprisonment.

(5) The court shall not impose the sentence of death on the defendant if the sentencing hearing results in a verdict or finding that at the time of the offense:

(a) He was under the age of eighteen; or

(b) His capacity to appreciate wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution; or

(c) He was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution; or

(d) He was a principal in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

(e) He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person.

(6) If no factor set forth in subsection (5) of this section is present, the court shall sentence the defendant to death if the sentencing hearing results in a verdict or finding that:

(a) The defendant has previously been convicted by a court of this or any other state, or of the United States, of an offense for which a sentence of life imprisonment or death was imposed under the laws of this state or could have been imposed under the laws of this state if such offense had occurred within this state; or

(b) He killed his intended victim or another, at any place within or without the confines of a penal or correctional institution, and such killing occurred subsequent to his conviction of a class 1, 2, or 3 felony and while serving a sentence imposed upon him pursuant thereto; or

(c) He intentionally killed a person he knew to be a peace officer, fireman, or correctional official. The term "peace officer" as used in this section means only a regularly appointed police officer of a city, marshal of a town, sheriff, undersheriff, or deputy sheriff of a county, state patrol officer, or agent of the Colorado bureau of investigation; or

(d) He intentionally killed a person kidnapped or being held as a hostage by him or by anyone associated with him; or

(e) He has been a party to an agreement in furtherance of which a person has been intentionally killed; or

(f) He committed the offense while lying in wait, from ambush, or by use of an explosive or incendiary device. As used in this paragraph (f), explosive or incendiary device means:

(I) Dynamite and all other forms of high explosives;

(II) Any explosive bomb, grenade, missile, or similar device; or

(III) Any incendiary bomb or grenade, fire bomb, or similar device, including any device which consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and can be carried or thrown by one individual acting alone; or

(g) He committed a class 1, 2, or 3 felony and, in the course of or in furtherance of such or immediate flight therefrom, he intentionally caused the death of a person other than one of the participants; or

(h) In the commission of the offense, he knowingly created a grave risk of death to another person in addition to the victim of the offense; or

(i) He committed the offense in an especially heinous, cruel, or depraved manner.

Source: Repealed and reenacted, L. 74, p. 252, § 4.

Editor's note: This section became effective January 1, 1975, and applies to offenses occurring on or after said date.

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF PITKIN*

STATE OF COLORADO

Criminal Action No. C-1616

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, vs. THEODORE ROBERT BUNDY, Defendant.	MEMORANDUM OPINION AND ORDER (Re: Motion to Strike the Death Penalty From Consideration)

On May 16, 1977, the defendant filed a Motion to Strike the Death Penalty from Consideration in this case on numerous grounds, including violation of the prohibition of cruel and unusual punishment pursuant to the Eighth and Fourteenth Amendments to the Constitution of the United States of America. The motion was argued on June 7, 1977 and again on June 23, 1977. The People were represented by Deputy District Attorney Milton Blakey, Esq. of the Fourth Judicial District, who had been appointed as a deputy district attorney in the Ninth Judicial District for the purpose of this case. Defendant represented himself and was assisted by James F. Dumas, Jr., Chief Deputy Public Defender, who at the time was acting as advisory counsel for the defendant.

The Court has considered the motion and argument of counsel and the briefs filed by counsel and, on the basis thereof, issues the following opinion and order.

The defendant is charged with the crime of first degree murder under the laws of the State of Colorado, pursuant to a statute which provides:

> "18-3-102. Murder in the first degree. (1) A person commits the crime of murder in the first degree if: (a) After deliberation and with the

*Transferred to El Paso County prior to entry of Order.

intent to cause the death of a person other than himself, he causes the death of that person or of another person; ..." C.R.S. 18-3-102 (1973), as amended.

Murder in the first degree is a class one felony. Id.

Upon conviction of a class one felony, a separate sentencing hearing is to be conducted before the trial jury to determine whether the defendant should be sentenced to death or life imprisonment. C.R.S. 16-11-103 (1973), as amended. That statute is lengthy and is set forth in full in the appendix to this opinion.

Defendant contends that to impose the death penalty upon conviction of the crime with which he is charged would constitute cruel and unusual punishment in violation of the Eighth and Fourteent Amendments to the Constitution of the United States.

Decisions of the United States Supreme Court in recent years provide guidelines to determine whether a punishment is cruel and unusual in the Eighth Amendment sense. If the procedures for imposing sentence create a substantial risk that the sentence will be imposed arbitrarily or capriciously, the punishment may be cruel and unusual. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972); Gregg v. Georgia, _____U.S._____, 96 S. Ct. 2909 (1976) If the punishment is excessive, it is cruel and unusual punishment. See Gregg v. Georgia, supra.

Punishment may be excessive either because it involves unnecessary or wanton infliction of pain or because it is grossly out of proportion to the severity of the crime. See Gregg v. Georgi supra. In Coker v. Georgia, _____U.S._____, 97 S.Ct. 2861 (1977), a death sentence was held to be grossly out of proportion to the seve of the crime of rape of an adult woman.

The Eighth Amendment prohibition of cruel and unusual puni

ment is not a static concept. "(t)he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, at p. 101 of 356 U.S., cited in Gregg v. Georgia, supra. "But our cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty must also accord with 'the dignity of man' which is the 'basic concept underlying the Eighth Amendment.' Trop v. Dulles, supra..." Gregg v. Georgia, at p. 2925 of 96 S.Ct.

The death penalty does not constitute cruel and unusual punishment under all circumstances. Gregg v. Georgia, supra; Proffitt v. Florida, _____U.S._____, 96 S.Ct. 2960 (1976); Jurek v. Texas, _____U.S._____, 96 S.Ct. 2950 (1976). Murder is an offense for which, under appropriate circumstances, the death penalty may be imposed. Gregg v. Georgia, supra; Proffitt v. Florida, supra; Jurek v. Texas, supra.

In the process of deciding whether the death penalty is to be imposed, consideration of the character and record of the individual offender and the circumstances of the offense are constitutionally required. Woodson v. North Carolina, _____U.S._____, 96 S.Ct. 2978 (1976). In that case, it is stated by the plurality at p. 2991 of 96 S.Ct:

> "While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlyi the Eighth Amendment, see Tropp v. Dulles, 356 U.S., at 100 78 S.Ct., at 597 (plurality opinion), requires consideratio of the character and record of the individual offender and the circumstances of the particular offense as a constituti ally indispensable part of the process of inflicting the penalty of death."

Thus, a statute making the death penalty mandatory for first degree murder, which included any deliberate and premeditated homicide and any felony murder, without regard to the character and record of the individual offender or the circumstances of the offense is

unconstitutional. Woodson v. North Carolina, supra. Even if a mandatory death penalty statute limits the crimes for which death is to be imposed to narrowly drawn categories of first degree murder, the same constitutional infirmity exists if the sentencing procedures do not permit consideration of the character and record of the offender and the circumstances of the offense. Stanislaus Roberts v. Louisiana, _____U.S._____, 96 S.Ct. 3001 (1976). And even where a mandatory death penalty statute relates to the narrow category of killing a human being when the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or peace officer who was engaged in the performance of his lawful duties, the imposition of the penalty is unconstitutional. Harry Roberts v. Louisiana, _____U.S._____ 97 S.Ct. 1993 (1977); Washington v. Louisiana, 428 U.S. 906, 96 S.Ct. 3214 (1976). In Harry Roberts, the Court said, at p. 1995 of 97 S.Ct.

> "To be sure, the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravated circumstance. There is a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property. But it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer. Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer and which are considered relevant in other jurisdictions."

> "As we emphasized repeatedly in Roberts* and its companion cases decided last term, it is essential that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense. Because the Louisiana statute does not allow consideration of particularized mitigating factors, it is unconstitutional."

See Jurek v. Texas, supra, at p. 2958 of 96 S.Ct., where it is said:

> "What is essential is that the jury have before it all possible relevant information about the individual

*Stanislaus Roberts v. Louisiana, supra.

> defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced."

The Court in Harry Roberts v. Louisiana, supra, left open the question whether a mandatory death penalty might pass constitutional muster where based upon intentional killing by a person serving a life sentence. It suggested that such a situation presents "a unique problem that may justify such a law" Harry Roberts v. Louisiana, supra, at p. 1995, footnote 2, and at p. 1996, footnote 5, of 97 S. Ct.

Although striking down the mandatory death penalty statutes the Court has upheld the constitutionality of certain death penalty statutes which permitted consideration of mitigating circumstances. Gregg v. Georgia, supra; Proffitt v. Florida, supra; Jurek v. Texas supra.

The purposes for which evidence of mitigating circumstances may be received under the Georgia, Florida and Texas statutes and the procedures under those statutes for determination of the appropriate penalty are instructive in determining the scope of evidence of mitigating circumstances and the purpose of such evidence which are mandated by the United States Constitution. The statutes of these three states will be considered individually, and the Colorado statute will then be compared to them.

Florida:

The Florida statute provides for a bifurcated trial, with the sentencing stage to take place before the same jury which determined guilt.

The Florida statute contains eight aggravating circumstance and the following seven mitigating circumstances:

> "(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime." Sec. 921.141(6) (Supp. 1976-1977), Florida statutes, cited in Footnote 6 of Proffitt v. Florida, supra, at p. 2965 of 96 S.Ct.

At the sentencing stage, "Evidence may be presented on any matter the judge deems relevant to sentencing and must include matters relating to certain legislatively specified aggravating and mitigating circumstances." (Emphasis added). (Conclusion as stated by the United States Supreme Court in Proffitt v. Florida, supra, at p. 2964 of 96 S.Ct.) The jury is directed to consider "(w)hether sufficient mitigating circumstances exist...which outweigh aggravating circumstances found to exist; and...(b)ased on these considerations, whether the defendant should be sentenced to life (imprisonment) or death." Florida statute, quoted in Proffitt v. Florida, supra, at p. 2965 of 96 S.Ct. The jury determination is by majority vote and is advisory only. In order to sustain a death sentence following a jury recommendation of life "...the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Florida; 1975), quoted in Proffitt v. Florida, supra, at p. 2965 of 96 S.Ct. The trial court must then weigh the statutory aggravating and mitigating circumstances in imposing sentence. If a death sentence is imposed, the trial court must make written findings of fact that sufficient statutory aggravating circumstances exist and that there are insufficient statutory

at p. 2920 of 96 S.Ct.

Under Georgia case law, the defendant is accorded substantial latitude as to the types of evidence he may introduce, and the jury may consider the evidence adduced at the guilt stage. Gregg v. Georgia, supra. In determining sentence, the jury is to consider "any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of (10) statutory aggravating circumstances which may be supported by the evidence..." Georgia statute, quoted in Gregg v. Georgia, supra, at p. 2921 of 96 S.Ct. The scope of the nonstatutory aggravating or mitigating circumstances is not delineated in the statute. The jury imposes a binding recommendation of sentence, and the death sentence may be imposed only if one of the statutory aggravating circumstances is found to exist beyond a reasonable doubt and the jury then elects to impose the death sentence. Gregg v. Georgia, supra. The jury must specify the aggravating circumstances found if its recommendation is death.

Texas:

Texas limits capital homicides to five specific types of especially serious homicides.

The Texas statute provides for a bifurcated trial, with the sentencing stage to take place before the same jury which determined guilt. At the sentencing stage, any relevant evidence may be produced. The jury is then required to answer the following three questions:

> "(1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased."
>
> Texas statute, quoted in Jurek v. Texas, supra, at p. 2955 of 96 S.Ct.

the people or the defendant..." C.R.S. 16-11-103(2) (1973). The jury must render a verdict as to the existence or nonexistence of each of the statutory mitigating and aggravating factors. If the verdict is that none of the statutory mitigating factors exists and that one or more of the statutory aggravating factors exists, the court must sentence the defendant to death. Any other combination of findings results in a sentence to life imprisonment. The statutory mitigating factors may be summarized as: (1) under the age of 18, (2) impairment of capacity to appreciate wrongfulness of conduct or to conform conduct to requirements of law, (3) duress, (4) relatively minor participation in offense committed by another and (5) inability reasonably to foresee that his conduct would cause or create a grave risk of death to another. Seven of the eight statutory aggravating factors focus on the nature of the offense; the eighth relates to prior conviction for a crime involving a penalty of life imprisonment or death. C.R.S. 16-11-103 (1973).

Under the Colorado statute, being under the age of 18 is the only aspect of defendant's personal background and circumstances, other than mental condition at the time of the crime, which can be considered. Whether defendant is just 18 or an experienced, mature adult has no relevance. Defendant's criminal record or lack thereof has no relevance. His past contributions to family or community, his remorse or lack thereof and other factors which reflect defendant's character and background have no relevance. In Woodson v. North Carolina, supra, in the course of holding the consideration of the character and record of the individual offender to be a constitutionally indispensable part of the process of inflicting the penalty of death, it was said by the plurality at p. 2991 of 96 S.Ct:

"A process that accords no significance to relevant

> facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."

In summary, Florida, Georgia and Texas all allow the defendant substantial latitude in introduction of evidence of mitigating circumstances at the sentencing stage in a capital case. Direct use of that evidence by the jury is an important part of determination of the sentence by the Georgia jury. Direct use of that evidence is an important part of the process by which the Texas jury answers statutory questions, such answers in turn being determinative of the sentence. In Florida, the jury uses that evidence to arrive at an advisory sentence of death or life imprisonment. The Florida courts cannot impose a death penalty in the face of an advisory sentence of life imprisonment unless it can find the facts suggesting a sentence of death to be so clear and convincing that virtually no reasonable person could differ. The narrow scope of mitigating evidence which is available to juries in Colorado at the sentencing stage in a capital case presents a marked contrast to the Florida, Georgia and Texas patterns. Viewed from the other side of the coin, many mitigating circumstances necessary to develop facets of the character and record of the defendant as a uniquely individual human being have no relevance to the mitigating factors prescribed by law in Colorado. Colorado's statutory sentencing plan is too rigid to satisfy constitutional standards.

Consideration has been given to the possibility of construing the Colorado statute to permit introduction of a broad range of mitigating evidence. The statute is presumed to be constitutional

and must be construed to preserve its constitutionality if at all possible. See People v. Prante, 177 Colo. 243, 493 P.2d 1083 (1972). A statute can be found unconstitutional only if its unconstitutionality is established beyond a reasonable doubt. See People v. Prante, supra. The statute is explicit in authorizing presentation of evidence bearing on the statutory mitigating and aggravating factors. The jury's function is to determine whether any of these mitigating factors or aggravating factors exist. There would be no legitimate use to which the jury could put evidence in mitigation not relevant to the statutory mitigating factors. Any attempt to construe the Colorado statute to permit consideration and use of mitigating evidence not relevant to the statutory mitigating factors would do violence to the statutory pattern and would constitute impermissible judicial amendment of the legislative enactment. It also would invite impermissible jury nullification. See Woodson v. North Carolina, supra, at p. 2990 of 96 S.Ct.; Stanislaus Roberts v. Louisiana, supra, at p. 3007 of 96 S.Ct.

Accordingly, it is concluded that the imposition of the death sentence pursuant to Colorado statute for the offense with which the defendant is charged would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States of America. Whether the

Colorado Constitution imposes a higher standard is unnecessary to consider.

Defendant has urged other bases upon which he contends that the death sentence could not become a permissible sentencing alternative in his case. These will be considered briefly but not in detail in view of the conclusion expressed above.

Vagueness of Statutory Mitigating Factors:

Defendant contends that the statutory mitigating factors, except for age, are too vague to be applied. The same challenge to strikingly similar mitigating circumstances was raised and rejected in Proffitt v. Florida, supra. The Court said at p. 2969 of 96 S.Ct:

> "While these questions and decisions may be hard, they require no more line-drawing than is commonly required of a fact finder in a lawsuit."

See also, Jurek v. Texas, supra, at p. 2957 of 96 S.Ct.

Failure to provide objective standards to guide the jury in imposition of the penalty of death:

Except as defendant imports objections to the availability and scope of appellate review, limitation of evidence in mitigation, allocation of burden of proof and other objections separately stated, his argument of failure to provide objective standards seems to be a variant of the vagueness argument, considered above, with respect to statutory mitigating factors. The only aggravating factor which reasonably could be contended to be vague is the final factor "He committed the offense in an especially heinous, cruel or depraved manner." C.R.S. 16-11-103(6)(i) (1973). Florida has a similar standard, except that "atrocious" is substituted for "depraved". The Florida Supreme Court has construed the standard to be directed only at the conscienceless or pitiless crime which is unnecessarily torturous to the victim. As so construed, the United States Supreme

Court held that "We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." Proffitt v. Florida, supra, at p. 2968 of 96 S.Ct. See Gregg v. Georgia, supra, at p. 2938 of 96 S.Ct. The Court in Proffitt also found not impermissibly vague the standard that "the defendant knowingly created a great risk of death to many persons,", a standard similar to the penultimate aggravating circumstance in the Colorado statute. C.R.S. 16-11-103(6)(h) (1973).

Failure to provide for appellate review:

As pointed out in the briefs, the availability and scope of appellate review of jury findings at the sentencing stage of a first degree murder trial in Colorado are not at all clear. In Gregg v. Georgia, supra, in which the jury had the sentencing authority, the Court considered Georgia's elaborate appellate procedures for assuring proportionality of sentences to be important to the validity of the procedure for imposing the death penalty. In Florida, where they jury makes a nonbinding sentencing recommendation, the state supreme court took a similar review role on its own initiative without specific statutory authority, and this was considered important to the validity of the Florida system in Proffitt v. Florida, supra. Texas too has appellate review of the jury's decision, which includes a prediction of probabilities that the defendant would commit acts of violence that would constitute a continuing threat to society. Under the Colorado system, the appellate courts are given no legislative authority to review for proportionality. The limited evidence relevant to the mitigating and aggravating factors in many cases would inhibit the appellate court from evaluation and comparison necessary to determine proportionality of sentences. It appears that there is a substantial question whether

the Colorado appellate review procedure is adequate to assure that the death penalty will not be arbitrarily or capriciously imposed. In view of the fact that the statute has been found infirm for another reason, and in view of the absence of guidelines at this time as to how the Colorado appellate courts will view their own roles on appeal, this issue will not be pursued to the extent necessary to make a definite determination.

Failure to show that the death penalty fulfills a compelling state interest which could not be fulfilled by a less drastic means:

Defendant argues that substantive due process requires that the state demonstrate that the death sentence is the least restrictive means to further a compelling government interest.

In Gregg v. Georgia, supra, it was held that the punishment of death does not invariably violate the constitution and that a Court

> "...may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved." 96 S.Ct. at p. 2926

The Court went on to hold the death penalty constitutional as a penalty for murder under the procedure prescribed by Georgia for its imposition. Thus, defendant's argument, to the extent it is founded upon the United States Constitution, is not well taken.

Defendant urges a substantive due process analysis. The analysis proceeds from the characterization of life as a fundamental constitutional right. Infringement of a fundamental constitutional right must be subjected to strict scrutiny under a due process analysis. This requires the state to demonstrate a compelling government interest to support the infringement and to find an absence of less restrictive means to realize that compelling government interest. The analysis then proceeds to attempt to show

that the death penalty is not the least restrictive means available to satisfy the government interest to protect society from murderers and to deter murders. Such an analysis has been used by the Massachusetts Supreme Court in invalidating the imposition of the death penalty for the crime of murder committed in the course of a rape or an attempted rape under the Massachusetts declaration of rights.

The United States Supreme Court plurality has not analyzed the issue in such terms. Gregg v. Georgia, supra. Of course, the Colorado courts are free to adopt such analysis in construing the Colorado Constitution. It is unnecessary to embark on such an analysis in view of the conclusion reached above, and it would be unwise to do so absent the necessity therefor.

Violation of due process concepts of proof beyond a reasonable doubt and presumption of innocence:

The defendant argues from cases requiring the People to prove every element of their case, including negation of affirmative defenses, beyond a reasonable doubt that such a burden is constitutionally required in establishing aggravating circumstances and eliminating mitigating circumstances at the penalty stage. No case is cited directly in support of this proposition. Nothing in the Gregg, Proffitt, Jurek, Woodson, Stanislaus Roberts line of cases suggests such a requirement. The People take the position in their brief that they have the burden to establish aggravating factors and to negate the existence of mitigating factors. Even if this burden can be borne by establishing such matters by a preponderance of the evidence, no constitutional infirmity is perceived in use of such a procedure at the sentencing stage.

Based upon the foregoing Memorandum Opinion, it is found that the Colorado statutory procedures for imposition of the death

IN THE DISTRICT COURT IN AND FOR

THE COUNTY OF PITKIN AND

STATE OF COLORADO

Criminal Action No. C-1635

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, vs. THEODORE ROBERT BUNDY, Defendant.	MOTION TO WITHDRAW AS ADVISORY COUNSEL

COMES NOW Kenneth Dresner, Advisory Counsel to the defendant in the within matter, and moves this Court to issue an Order relieving him of his duties as Advisory Counsel to the defendant and in support thereof states as follows:

1. Kenneth Dresner has been appointed a Deputy State Public Defender effective July 1, 1978 and will be working out of the Pueblo office of the State Public Defender as of said date.

2. The Public Defender's office originally represented the defendant in the within matter but was relieved due to a conflict of interest.

3. Said conflict of interest will apply to Kenneth Dresner upon commencement of his employment as a Deputy State Public Defender.

WHEREFORE Kenneth Dresner requests that this Court issue an Order relieving of his duties as Advisory Counsel to the defendant.

Respectfully submitted,

Kenneth Dresner

Kenneth Dresner #4628
Advisory Counsel to Defendant
307 N. Main
Gunnsion, Colorado 81230

CERTIFICATE OF MAILING

I certify that I have served a copy of the within Motion upon the People by placing a copy of same in the U.S. mail, postage prepaid, addressed to:

Milton Blakey
Assistant District Attorney
District Attorney's Office
20 East Vermijo, Suite 310
Colorado Springs, Colorado 80903

on this 2nd day of June, 1978.

Kenneth Dresner

IN THE DISTRICT COURT IN AND FOR

THE COUNTY OF PITKIN AND

STATE OF COLORADO

Criminal Action No. C-1616

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, vs. THEODORE ROBERT BUNDY, Defendant.	MOTION TO WITHDRAW AS ADVISORY COUNSEL

COMES NOW Kenneth Dresner, Advisory Counsel to the defendant in the within matter, and moves this Court to issue an Order relieving him of his duties as Advisory Counsel to the defendant and in support thereof states as follows:

1. Kenneth Dresner has been appointed a Deputy State Public Defender effective July 1, 1978 and will be working out of the Pueblo office of the State Public Defender as of said date.

2. The Public Defender's office originally represented the defendant in the within matter but was relieved due to a conflict of interest.

3. Said conflict of interest will apply to Kenneth Dresner upon commencement of his employment as a Deputy State Public Defender.

WHEREFORE Kenneth Dresner requests that this Court issue an Order relieving of his duties as Advisory Counsel to the defendant.

Respectfully submitted,

Kenneth Dresner

Kenneth Dresner #4628
Advisory Counsel to Defendant
307 N. Main
Gunnsion, Colorado 81230

CERTIFICATE OF MAILING

I certify that I have served a copy of the within Motion upon the People by placing a copy of same in the U.S. mail, postage prepaid, addressed to:

Milton Blakey
Assistant District Attorney
District Attorney's Office
20 East Vermijo, Suite 310
Colorado Springs, Colorado 80903

on this 2nd day of June, 1978.

Kenneth Dresner

IN THE SUPREME COURT OF THE STATE OF COLORADO

THE PEOPLE OF THE STATE OF COLORADO BY AND THROUGH THEIR DULY APPOINTED REPRESENTATIVES, FRANK G. E. TUCKER, DISTRICT ATTORNEY,

Petitioners,

v.

No. 27963

THE DISTRICT COURT OF THE STATE OF COLORADO, ET AL.,

Respondents.

ORIGINAL PROCEEDING

~~xAppealxFrom~~ _____

~~Courtxofx~~ _____

~~Countyx~~

Upon consideration of the motion of the Respondents, it is this day ordered that said Respondents have additional time, to and including April 27, 1978 within which to file answer to rule to show cause herein.

BY THE COURT, EN BANC, APRIL 28, 1978.

DAVID W. BREZINA,
Clerk Supreme Court

By Joan M Rhyne
Deputy Clerk

cc:

Kenneth Dresner, Esq.
207 N. Main
Gunnison, CO 81230

Milton Blakey,
Assistant District Attorney
Ninth Judicial District
District Attorney's Office
Aspen, CO 81611